No. 147

IN THE

Supreme Court of the United States

October Term, 1947

WILLIAM M. LINDENFELD,

Petitioner,

—against—

UNITED STATES OF AMERICA,

Respondent.

PETITION AND BRIEF FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

WILLIAM M. LINDENFELD,
Petitioner in person.

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Cases Cited

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To the Honorable Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States.

Your petitioner, WILLIAM M. LINDENFELD, respectfully prays for a writ of certiorari to the United States Circuit Court of Appeals, for the Second Circuit, to review an order of that Court entered on May 11th, 1948, affirming an order of the District Court of the United States for the Eastern District of New York, entered in that Court on February 25th, 1948, which denied petitioner's motion to set aside criminal indictment filed therein against petitioner on January 21, 1943 as well as the judgment of conviction entered thereon on April 28th, 1943, convicting petitioner of violation of Section 2554, Internal Revenue Code, after trial before the late District Judge Grover M. Moscowitz and a jury.

Statement of Matters Involved

Petitioner's motion had been predicated upon the ground that the aforesaid criminal indictment had been obtained upon the false, perjured and suppressed testimony of three (3) drug addicts, criminals of long standing, who admittedly testified before the Grand Jury, "that for the mere asking" they obtained prescriptions of petitioner, a physician, for morphine sulphate. While, in truth and in fact as testified on cross examination at the trial, these same three (3) individuals testified, that the only way in which they truly obtained the prescriptions, was, by presenting themselves at petitioner's medical office, posing as patients, feigning illnesses of the heart and like ailments, and that petitioner "after examinations" did prescribe prescriptions of small quantities.

Petitioner upon his motion urged, that that testimony was suppressed from the Grand Jury and the false testimony given the Grand Jury. In addition, petitioner on his motion urged and asserted further vital testimony of his innocence was suppressed from the Grand Jury, namely, the testimony of a Government agent (who had supervised the addicts in obtaining the prescriptions), named Amato, who on two occasions prior to the return of the indictment, himself sought to obtain prescriptions of petitioner, by presenting himself at petitioner's office on two occasions "as a patient", who sought to feign severe heart ailments but who was unable to obtain any prescriptions of petitioner.

Upon petitioner's motion in the District Court the Government filed a short affidavit, simply urging the case moot since petitioner's conviction had been affirmed on appeal and certiorari denied (323 U. S. 761) (because appellant sought to prosecute the Certiorari as a pauper

while not a citizen hence it was disallowed) yet, the Government at no time denied or disputed the grounds of petitioner's motion, even though petitioner's affidavit particularized the aforesaid perjury and suppressed testimony.

ARGUMENT

I

The rulings of the Courts below, are clearly contrary to the law as asserted by this Court in, *Fiswick* v. *United States* (December 9th, 1946).

The pertinent facts in the case at bar, are to a great degree, parallel with the facts in the *Fiswick* case. Namely, petitioner here, is an alien, subject to deportation by reason of the judgment of conviction. Petitioner in the true administration of Justice, is seeking to remove the stigma of the judgment of conviction and restore himself to his medical profession and good name in the community and that he may obtain his Final Papers of citizenship.

Where before the Grand Jury the witness Port testified he obtained the prescriptions for the mere asking, yet on the trial he swore,

> "Q. What did you do when you went in on the first occasion and he threw you out? A. I told him I would like an examination. I had severe pain over the heart.
>
> Q. Did anyone tell you to use this method? A. You have got to do that.
>
> Q. You did not say you wanted drugs? A. No."

The other two drug addicts of long criminal standing gave parallel testimony.

Petitioner urged in the Court below, that it was the duty of the prosecutor to disclose all of his evidence to the Grand Jury, and that the suppression of the testimony of John Amato the Government agent who supervised these addicts, and who was unsuccessful in obtaining prescriptions of petitioner on two occasions, nullified the indictment and was an abuse of the office of the prosecution.

In like fashion petitioner urged that the prosecutor suppressed from the Grand Jury, the first exception of Section 2554 of the Internal Revenue Code, which expressly permits physicians (as petitioner) to issue prescriptions for morphine sulphate. Said first exception reading:

USE OF DRUGS IN PROFESSIONAL PRACTICE.

"To the dispensing or distribution of any of the drugs mentioned in Section 2550 (a) to a patient by a physician, dentist, or veterinary surgeon registered under Section 3221 in the course of his professional practice only; Provided, such physician, dentist, or veterinary surgeon shall keep a record of all such drugs dispensed or distributed, the date, and the name and address of the patient to whom such drugs are dispensed or distributed to a patient upon whom such physician, dentist, or veterinary surgeon shall personally attend; and such record shall be kept for a period of two years from the date of dispensing or distributing such drugs, subject to inspection as provided in Section 2556."

Petitioner urged in the Courts below and respectfully urges in this Court, that had the three addicts testified truthfully, had the government produced John Amato before the Grand Jury, as by law the Government was required so to do, that the Grand Jury would have been powerless to have returned any indictment in the case at bar, since it is undisputed that the prescriptions were

issued by petitioner, "at his office, after examinations of each and all of the so-called patients and in reliance of their complaints of heart ailments." Indeed, one of such addicts (Sherman) suffered an alleged "heart attack" in petitioner's office.

Petitioner in his motion showed, that he only ascertained the falsity of the testimony before the Grand Jury and suppression of testimony thereat, in June of 1947 when he promptly moved.

Petitioner further sought in the Court below, in aid of the application, a hearing of the application, the taking of testimony and inspection of the Grand Jury minutes, or its inspection thereof by the Court.

Petitioner's application was in all respects summarily denied.

CONCLUSION

The Constitution of the United States prohibits the criminal trial based upon an indictment obtained upon false testimony and suppressed evidence.

It is respectfully urged that the application for a writ of certiorari should be granted.

Dated, New York, July 8th, 1948.

Respectfully submitted,

WILLIAM M. LINDENFELD,
Petitioner.

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CITATIONS

799544—48

In the Supreme Court of the United States

OCTOBER TERM, 1948

No. 147

WILLIAM M. LINDENFELD, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The formal order of the district court, entered February 25, 1948, denying petitioner's motion to vacate was affirmed in open court by the circuit court of appeals without opinion (R. 35).

JURISDICTION

The order of the circuit court of appeals was entered May 11, 1948 (R. 35) and the petition for certiorari was filed July 10, 1948, the petitioner having been granted an extension of time therefor to July 10, 1948, by order of this Court, dated June 5, 1948. The jurisdiction of this

Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether the district court had jurisdiction to set aside a judgment of conviction on grounds of alleged irregularities before the grand jury where the sentence entered pursuant thereto has been completely served, and the motion to set aside is made approximately four years after the entry of the judgment.

2. If so, whether the district court erred in refusing to set aside the indictment and judgment of conviction entered thereon against petitioner.

STATEMENT

In 1943, petitioner, a licensed physician, was convicted on all counts of a fifteen count indictment returned against him in the United States District Court for the Eastern District of New York charging unlawful sales of narcotics in violation of 26 U. S. C. 2554 (a) in the period from August to November, 1942. His conviction was affirmed on appeal, 142 F. 2d 829, and certiorari was denied by this Court, 323 U. S. 761.

Petitioner's conviction was based largely on the testimony of three addict-informers, Port, Collins and Friburg. The addicts were brought by government agents to the vicinity of petitioner's

office, thoroughly searched, given money, and told to enter petitioner's office, feign illness and ask for drugs. On each occasion a prescription for drugs was obtained for the money which was given by the informers. At the trial, the informers and two other drug addicts who obtained prescriptions from petitioner testified that petitioner gave them a very cursory examination following a question as to their ailment. For the multitude of ailments complained of, petitioner always prescribed morphine sulphate. Prior to the first visit of each of the informers, they were examined by government physicians and found to have no ailment requiring the administering of narcotics. Their bodies were all found to show signs of "needle marks." See 142 F. 2d 829, 830; Government's Memorandum in Opposition No. 261, O. T. 1944.

After completing service of his sentence, petitioner, an alien, apparently became cognizant that he was subject to deportation (see R. 31) for having committed an offense involving moral turpitude within five years after his entry into the United States (8 U. S. C. 155), and moved in the district court for an order vacating the indictment and judgment of conviction (R. 14–25). Petitioner asked for inspection of the grand jury minutes, and moved for vacation of the judgment on the ground that (1) the three informers had given false testimony before the grand jury

and "suppressed," i. e., withheld testimony; (2) that Amato, a federal narcotic agent, who testified at the trial that he twice tried and failed to obtain prescriptions for narcotics from petitioner, was not summoned before the grand jury; and (3) that the grand jury was not informed of 26 U. S. C. 2554 (c) (1), exempting physicians under certain circumstances from the requirements of Section 2554 (a).

As to the witness Port, petitioner alleged that he withheld from the grand jury the testimony which he gave before the trial court to the effect that he had feigned illness in order to obtain prescriptions for narcotics. Petitioner alleged that Port told the grand jury that "he didn't know" what his trouble was and that "he didn't feel right" (R. 18–21). As to Collins, petitioner alleged that at the trial Collins testified that he told petitioner on August 10, 1942, that he had pains over his heart, whereas before the grand jury he said that on August 10 he entered petitioner's office and, that as he had been there before, petitioner asked if he desired more drugs (R. 21–22). As to Friburg, petitioner alleged that before the grand jury Friburg stated that he complained of pains in the chest, whereas at the trial the witness testified "I imitated a person who was in pain, by putting my hands on my chest" (R. 22).

The district court denied the motion to vacate as based on insufficient evidence and denied the

motion to inspect the grand jury minutes because no sufficient reason therefor was shown (R. 35).[1] On appeal the Circuit Court of Appeals for the Second Circuit affirmed the order in open court (R. 35).

ARGUMENT

1. Petitioner was convicted by a jury after a fair trial on evidence which, on review, was found amply sufficient to support his conviction. He now seeks to have that conviction set aside on the basis of alleged errors which relate, not to the fairness of the trial nor the sufficiency of the proof of guilt at the trial, but to the regularity of the means by which he was accused. Manifestly, a judgment of conviction cannot be so lightly overturned.

For the purpose of the present petition, it is unnecessary to consider to what extent a judgment of conviction in a federal court may be subject to attack by motion to vacate filed after service of a sentence. At best such relief would lie only for errors of fact of a "fundamental character, that is, such as rendered the proceeding itself irregular and invalid." *United States* v. *Mayer,* 235 U. S. 55, 69. Alleged errors in the

[1] As evidenced by the files of the Department, an earlier order of December 31, 1947, denying petitioner's motion is incorporated in petitioner's affidavit in support of his petition for rehearing, dated January 10, 1948, which motion was denied, and does not appear in the record of the case.

proceedings before the grand jury which do not reach into the trial itself are not errors of so fundamental a character. Were petitioner in custody under the sentence, he could not maintain habeas corpus on the basis of the errors now alleged. *Harlan* v. *McGourin*, 218 U. S. 442, 451; *Kaizo* v. *Henry*, 211 U. S. 146; *United States* v. *Thompson*, 144 F. 2d 604 (C. C. A. 2). Certainly his rights are no greater on a motion to vacate after sentence has been served.

2. Furthermore, assuming *arguendo*, that the conviction could be attacked for errors in proceedings before the grand jury, it is clear that petitioner has presented no grounds for such relief. In his affidavit in support of the motion petitioner did not explain in any way, except on information and belief, the basis of his assertions, nor how he expected to prove them; there is only a vague reference that petitioner first became aware of them at a hearing before the Board of Regents of the State of New York (R. 31). The absence of specific allegations as to the grounds for his belief would in itself justify denial of the motion. *Tinkoff* v. *United States*, 129 F. 2d 21 (C. C. A. 7); see *Tarrance* v. *Florida*, 188 U. S. 519, 521; *Glasser* v. *United States*, 315 U. S. 60, 87.

Even taking petitioner's allegations as to the informers at their face value, he has shown merely discrepancies in their testimony before

the grand jury and at the trial, discrepancies which do not alter the fundamental fact that witnesses found by government physicians to have no ailment requiring narcotics, obtained prescriptions for narcotics from petitioner. Petitioner considers the testimony given at the trial, including the testimony of Amato that he had tried and failed to get a prescription from petitioner, so favorable to him that, had it been presented to the grand jury, that body would not have indicted him. The short answer to his contention is that, on this very evidence, the petit jury found, not that petitioner was probably guilty—all that the grand jury had to find—but that petitioner was guilty beyond a reasonable doubt.[2]

CONCLUSION

It is obvious that the petitioner in this action is merely using delaying tactics in an effort to delay possible deportation. We therefore re-

[2] The petitioner's remaining contention that 26 U. S. C. 2554 (c) (1), which exempts physicians among others from the requirement of receiving a written order for the dispensing of drugs in the course of professional duty, was erroneously withheld from the grand jury, is groundless because it has been held consistently that the exceptions in that section of the narcotics statute need not be pleaded in the indictment, since they are matters of defense. *Nigro* v. *United States*, 117 F. 2d 624, 629 (C. C. A. 8), and cases cited therein; *Oakshette* v. *United States*, 260 Fed. 830 (C. C. A. 5). The petit jury found that petitioner did not come within the exception.

spectfully submit that the petition for a writ of certiorari should be denied.

PHILIP B. PERLMAN,
Solicitor General.
ALEXANDER M. CAMPBELL,
Acting Assistant Attorney General.
ROBERT S. ERDAHL,
BARTHOLOMEW B. COYNE,
Attorneys.

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